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ESSAY

BETWEEN INTIMATES AND BETWEEN NATIONS: CAN LAW STOP THE VIOLENCE?[†]

Martha Minow^{††}

One of my favorite philosophers is Yogi Berra. Yogi is supposed to have said, "When you come to a fork in the road, take it." And, "You can observe a lot by watching." And one more: "If people don't want to come out to the ball park, nobody's going to stop them."

That one you really have to think about. Nobody's going to stop the people who don't want to come. Nobody's going to stop the apathy. I hope, and believe, that in the last thirty years a lot of *somebodies* have tried to stop the apathy surrounding violence in two settings: violence in the home and violence between identifiable ethnic, religious, and national groups.

Struggles against domestic violence can be traced in this country at least to the first wave of the women's movement. The women who led the Temperance Movement wanted to stop men from spending their paychecks on liquor and then coming home, broke and drunk, to beat their wives and children.¹ More recently, a lone experiment in St. Paul, Minnesota to create a temporary home to shelter women from violence in their own homes inspired the thousands of shelters existing today, while at the same time launching a movement for criminal law enforcement and judicially-issued civil orders of protection against violence in the home. The animating vision was safety; people should be safe from physical assaults, forcible rape, and coercion by their intimate family members. The reformers have aimed to enable

[†] This article is adapted from a lecture delivered by Martha Minow at the Case Western Reserve University School of Law as part of the Arthur W. Fiske Memorial Lecture Series.

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¹ See ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 99-107 (1987).

separation. The goal has been to make a safe place for victims (which means, chiefly, women) to find sanctuary, and to use the power of the law either to incapacitate the violators or order them to stay away. Many states followed up with rules requiring police to arrest people found to be using violence against their spouses or romantic partners, and other rules requiring prosecutors to prosecute such cases—each seeking to make the criminal sanction effective.

With inter-group violence around the world, the goal has been to halt the violence and the strategy has been to advance intervention by non-governmental groups and international teams. The Middle East, Northern Ireland, Bosnia and Kosovo, Somalia and East Timor are only the most recent settings to elicit combinations of investigatory reports, humanitarian aid, third-party negotiators, military peacekeepers, and even military intervention.

A conception of inviolable boundaries is used to shield both the intimate and intergroup violence from public scrutiny and intervention. For husbands and wives, it was the boundary of the home; the private sphere shielding violence in the home lay beyond the reach of the law, whether as criminal or tort.² For conflicting ethnic and religious groups, it was the boundary of the state; no one outside could be heard on matters within without triggering claims that the nation's sovereignty was at stake. The triumph of individual rights, at least as rhetoric, broke through these boundaries over the past several decades. In this country, now, it is a distinctively minority and losing view to treat the home as beyond public scrutiny, and violence behind the veil of privacy. Internationally—as manifested by Amnesty International reports, NATO management of Kosovo, Secretary-General Kofi Anan's address last fall to the United Nations declaring an end to the old conception of state sovereignty,³ and international responses to the recent election of a seeming Nazi-sympathizer in Austria—the rights and dignity of each individual trump state borders.

Because of this basic similarity, I began to wonder what might be learned by exchanging insights about how best to respond to violence in both kinds of settings. I have only just started this research. I will sketch here potential lines of thought and inquiry in hopes of sparking further interest in the matter.

² See generally Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 122-23 (David Kairys ed., 1982) (explaining and criticizing the rationale and consequences of this public/private split); Katherine M. Schellong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 *MARQ. L. REV.* 79, 114 (1994) (criticizing the justification of protecting the privacy of the marital relationship for non-intervention in cases of domestic abuse).

³ See Peter Ford, *Few Sacred Borders to New UN*, *CHRISTIAN SCIENCE MONITOR*, Sept. 19, 1999, at 1.

I. COMPARING INTRAFAMILY AND INTERGROUP VIOLENCE

First, let me note that many others are drawing the comparison and connection. A town hall meeting organized by the East Harlem Coalition Against Domestic Violence a few years ago set as its topic: "If change is possible in South Africa, is change possible for battered women in New York State?"⁴

One of the most memorable calls I received after I published my book *Between Vengeance and Forgiveness*⁵ was from a woman named Judy Bethke who runs social service programs for abused children in Dorchester, a very poor section of Boston. She told me that she had been asked to consult with people in Northern Ireland about the trauma children there experienced under the troubles. I toured her facility and consulted with her, and was shocked to see a locked ward with two six-year olds on suicide watch. They lived with the devastating results of child abuse. Bethke told me that when some of her Northern Ireland contacts also toured her facility, they commented that perhaps they were lucky because in their part of the world, the violence had not permeated all the way inside the family. But apparently, reports of domestic violence in current-day Northern Ireland shrink this silver lining.

Trauma is indeed a uniting theme in any comparison of violence in intimate and intergroup settings. Judith Herman wrote a highly influential book entitled *Trauma and Recovery*,⁶ that connects the experiences of Holocaust victims, U.S. soldiers in Vietnam, battered women, child abuse victims, and incest survivors. She documents how victims of trauma in each of these circumstances come to give up their connections with others and even their moral principles in the face of terror, and how they often lose the desire to live. Those who survive often have trouble controlling their anger. They relive traumatic events. They often have difficulties sustaining relationships, beliefs, and a sense of meaning.⁷

These shared features of trauma justify comparing violence against women by their intimate partners and violence against neighbors by their neighbors. The shared tradition of borders and boundaries against scrutiny also joins the two contexts—as does the triumph of individual human rights over the past thirty years to challenge those borders. Once each individual is understood to be a rights bearer of equal dignity, the rationales of privacy and state sovereignty can no longer shield violations of individual rights from view. In-

⁴ Joyce Klempere, *Programs for Battered Women: What Works?*, 58 ALB. L. REV. 1171, 1171 (1995).

⁵ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

⁶ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1992).

⁷ See *id.* at 72-73, 92-93, 121, 137, 229.

stead, such shields begin to look like governmental complicity with the perpetrators of violence.

So far so good, but a funny thing happened on the way to the comparison. I began to notice a striking difference in the typical legal remedy pursued in the two contexts of domestic violence and intergroup violence. For domestic violence, the usual remedy of choice is separation: get the woman to a shelter, or make sure she gets a civil protection order with an order for the abuser to vacate the premises and stay away from her and the children, or get the police to arrest the violator immediately and to prosecute, even if the woman has second thoughts.⁸ For intergroup violence, the usual remedy is reconciliation, at least sufficient enough to permit peaceful coexistence. The analogy to separation would be partition of the territory, an option that is widely viewed as a poor solution.

Obviously, the circumstances differ considerably in the two contexts. With interethnic conflict, there are likely two or more groups with claims to the same or neighboring territory and no good options for relocating one of the groups. And interethnic conflict seemed to stop at the doorway of private homes—at least until Sarajevo and Rwanda showed us family members killing family members. Sometimes, the source of the intergroup violence can be traced to demagogic leaders or to factions who receive the blame while the mass of individuals themselves are then encouraged to work out a way to live together.

In contrast, with violence between intimate adults, closed doors signal danger and safety itself seems to require separation. Central questions, rightly or wrongly, have addressed: why do women stay in battering relationships, and what does it take to either help her to leave or to get him removed?⁹ Landmark decisions have even ruled that a court order directing the man to vacate the premises does not violate his property rights, even if the lease is in his name.¹⁰ Often,

⁸ See *infra* note 11 and accompanying text (including a further discussion of the dilemmas over mandatory arrest and no-drop prosecution rules).

⁹ When her retaliation should be excusable is another much debated and litigated subject. See, e.g., Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993) (questioning the use of a battered woman defense that relies on expert testimony about battered woman syndrome to demonstrate that the defendants should not be held responsible for their actions on account of their condition of victimization); see also Iris Marion Young, *The Generality of Law and the Specifics of Cases: A Comment on Elizabeth Schneider*, 57 U. PITT. L. REV. 549 (1996) (arguing that whether to use the battered woman defense should be decided based upon the specifics of each individual case). Given my work on vengeance and forgiveness, I would argue that victims of intimate abuse surely deserve some compassion and understanding when they have impulses or take actions of vengeance, but better steps would seek to prevent such actions. It is not that victims should be asked to forgive or forget, but they should be assisted to find a path between vengeance and forgiveness.

¹⁰ See, e.g., *Cote v. Cote*, 599 A.2d 869 (Md. Ct. Spec. App. 1992) (holding protection order requiring respondent to vacate marital home does not constitute a taking); *State ex rel.*

the woman is caring for children, and therefore has a greater need for the home; also, tacitly, the options of vacate orders and even battered women's shelters acknowledge that women may not be safe from other kinds of violence and economic disaster if they simply get out of their homes. The assumption is that the battered individual lacks relative power, economically and physically, and therefore the law must not only separate her from the abuser, but also stand in for her in decisions about whether to arrest and prosecute him.

This situation presents a profound dilemma. Should victims' choices be respected enough to determine whether to arrest and prosecute an abuser, or is paternalism warranted given the danger of victims recanting and opposing the arrest or prosecution of the abuser? Such victims may act out of fear of future violence; they may act with love for the abuser; they may fear what the law will do more than what the abuser will do.¹¹ But the paternalist approach risks recreating the pattern of forced helplessness that makes so many women victims of violence. Respecting the choice of women whose choices are so constrained by the realities of intimate violence risks further coercion, danger, and fear for the women and any children in the home. Certainly, the picture of the helpless victim contributes to the difficulties faced by battery victims who do not fit that image because they fight back and even kill the aggressor.

Now, to further complicate matters, consider the responses to child abuse in this country. This context illustrates the perfect middle ground between legal responses to battering between adults on the one side and intergroup conflict on the other. Over the past twenty years, we have been extremely torn in this country over whether to remove from the home children who have been abused and whether to make this removal permanent, or instead, whether to try to preserve the family, infuse it with services and supports, and make coexistence, if not reconciliation, possible.

Advocates of family preservation successfully secured passage of the federal Adoption Assistance and Child Welfare Act of 1980. It emphasizes that the most desirable place for children is with their own families. It also requires states receiving federal funds to make "reasonable efforts" to prevent unnecessary out-of-home placements and to make reasonable efforts to return a child to the family of ori-

Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (upholding constitutionality of *ex parte* temporary protection order which evicted the complainant from the family home); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (1979) (holding no due process violation in eviction of batterer).

¹¹ Thoughtful discussions appear in Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996), and Joan L. Neisser, *Lessons for the United States: A Greek Cypriot Model for Domestic Violence Law*, 4 MICH. J. GENDER & L. 171 (1996).

gin.¹² Its supporters stress that the racial and class biases of governmentally employed social workers lead to extreme misuse of the removal option. Societal circumstances of poverty and stressful conditions contribute to problems within the home and parents should not be blamed for them; the most likely alternative placement, foster care, does not offer children stability, love, a permanent home, or even safety from abuse. Families of color and immigrant families are in jeopardy—one out of five mothers in some communities are labeled outlaws¹³—if state power to remove children is unchecked.¹⁴ Those who favor family preservation warn that the nation's longstanding history of breaking up African-American families and removing Indian children from their communities cautions against ready use of governmental power to separate children from their families today.

In addition, removing children to foster care and adoptive homes can produce an irremediable loss of foundation relationships. Such a loss itself can impose life-long trauma. An unfixable sense of loss and rejection may also be coupled with fantasies about the absent parent that can even lead the child to idealize his rage and violence. Someone must take care of children until they can take care of themselves. Some advocates for family preservation maintain that those who gave birth to children are more likely to care what happens to them than anyone else. Others emphasize that social programs such as home visiting for newborns and their families, day care, Head Start, and family support programs can give children real life chances without removing them from their families of origin.¹⁵ When governments instead remove children from their parents and extended families, they are putting full responsibility on parents for patterns that at least in part are affected by—or are capable of remediation by—social practices.

Advocates of removal argue, in contrast, that giving parents second, third, and fourth chances wrongly minimizes the effects of abuse and neglect on children and also wrongly turns the children into

¹² For a discussion of the law from a social work perspective, see CHRISTOPHER G. PETR, *SOCIAL WORK WITH CHILDREN AND THEIR FAMILIES: PRAGMATIC FOUNDATIONS* 137-56 (1998).

¹³ See Barbara Bennett Woodhouse, *Poor Mothers, Poor Babies: Law, Medicine, and Crack*, in *CHILD, PARENT AND STATE: LAW AND POLICY READER* 111, 117 (S. Randall Humm et al. eds., 1994).

¹⁴ Peggy Cooper Davis has a project funded by the Open Society Foundation that pursues many of these issues and emphasizes the threat to cultural preservation from child welfare practices. For cautions about removing children, see generally *id.* The most successful family preservation program is Homebuilders in Tacoma, Washington, which suggests that intensive services infused in the homes of highly vulnerable families can keep them together even though most similar families would separate without the intervention; see also DAVID A. HAMBURG, *TODAY'S CHILDREN: CREATING A FUTURE FOR A GENERATION IN CRISIS* 83 (1992).

¹⁵ See, e.g., IRVING B. HARRIS, *CHILDREN IN JEOPARDY: CAN WE BREAK THE CYCLE OF POVERTY?* (1996) (addressing the need for social programs for poor children ages zero to three and teenagers in order to break the cycle of poverty).

means rather than primary subjects of concern.¹⁶ They stress that the focus on family preservation has led child welfare agencies, lawyers, and judges to try to preserve families at all costs, even when families seem hopelessly dysfunctional and when children suffer extreme forms of abuse. Therefore, they successfully sought the 1997 federal Adoption and Safe Families Act to specify that reasonable efforts were *not* required in such cases.¹⁷

Removal advocates further claim that rehabilitation efforts do not work at least in instances of severe child abuse.¹⁸ The high levels of substance abuse by violent and neglecting parents should—excuse the expression—*sober up* the do-gooders about difficulties in getting the parents to change. Recidivism rates in substance abuse and failure rates in treatment programs should be enough to show that most of the using parents will continue to use, and continue to put their children at risk.

Most basically, each new chance given to parents postpones the moment when the child will need a permanent placement. Not only does this make it harder for children to move and adjust, it also means the children will be older, more scarred, and frankly less attractive to potentially permanent adoptive parents. The children then are more likely to remain in temporary foster care. Adoption by strangers would be better than extended foster care even with kin if, in the words of one commentator, the strangers can “promote [the children’s] best lifetime developmental opportunities for success and self-sufficiency.”¹⁹ Some experts recommend removing the children as infants at the first sign of parental substance abuse, and then placing the infants with adoptive parents. Many more people want to adopt infants than prospective adoptive parents willing to take older and potentially troubled children. Above all, experts agree, children’s safety and well-being should be the focus.²⁰ But they disagree about what arrangements following abuse best serve the child.

¹⁶ See, e.g., ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (arguing for the use of adoption to protect battered children in the same way battered women are protected).

¹⁷ See *id.* at 42. Under this law, agencies are no longer required to make reasonable efforts to preserve families in all cases and instead are required to plan for a permanent home, which can be an adoptive home. The law also requires the filing of petitions to terminate parental rights in cases in which a child has been in foster care for certain periods of time or has been subject to especially egregious abuse. See *id.* at 158. Yet public and private funding for family preservation continues to grow. See *id.* at 43.

¹⁸ See *id.* at 109-10 (summarizing studies of rehabilitation efforts geared towards child abusers).

¹⁹ Richard P. Barth, *Abusive and Neglecting Parents and the Care of Their Children*, in *ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY* 217, 231 (Mary Ann Mason et al. eds., 1998).

²⁰ See, e.g., RICHARD GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* (1996) (arguing that the primary goal of social policy should be child safety and not family preservation).

I will not be able to resolve this argument over family preservation and child removal by myself, here and now.²¹ But the fact that child abuse has produced this intense disagreement over appropriate legal responses helps to highlight the contrasting responses to domestic violence between adults and to intergroup violence. Joining the family preservation and intergroup reconciliation modes are two quite different claims. First, relationships are themselves vital; breaking them off produces trauma while work on reconciliation can be healing and constructive.

Second, and in quite a different key: there are no good alternatives. Where exactly can the children go where they will have a better chance for love, care, and freedom from abuse? In most states, a child removed to foster care then faces the risks of several more changes in placement—and the same or greater chances of abuse in the foster home as the chances that exist among biological families. These facts should seriously caution any judge or social worker who takes seriously the injunction, “first do no harm.”²² And with interethnic conflict, commonly, there are no other places for people to go either; who exactly should get to stay in Jerusalem? The ethnic Albanian Kosovars did not belong in Albania, nor did the Albanians want them. I do not think that anyone thinks it a good result that the Serbs largely fled Kosovo (or faced some terrible acts of revenge) as the ethnic Albanians returned and yet some Serbs still engage in vicious violence against the ethnic Albanians who each claim Kosovo as their own.

The analogy between removal of a child and removal of an ethnic group from a scene of conflict is not perfect. But joining the strategy of removing a child from the home of abusive parents and the strategy seeking safe separation for adults in abusive relationships are two elements. Safety is the highest priority, and fundamental pessimism is the rational stance toward the possibility of changing the behavior of those who are violent.

For children, those seeking removal view the relationships themselves as less valuable than giving the children a new start. Children may say that they want to stay with an abusive parent but that is because they know nothing else. Similarly, with intimate abuse between

²¹ Elsewhere, I have suggested that a complete approach toward family violence would require dealing with family dynamics and societal attitudes as well as the violent behavior of individuals. See Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671-72 (1990).

²² One study indicates that the rate of substantiated abuse and neglect in New York City foster family care was more than one-and-one-half times that of children in the general population. See Michael B. Mushlin, *Unsafe Havens: Cases for Constitutional Protection of Foster Children from Abuse and Neglect*, in CHILD, PARENT AND STATE: LAW AND POLICY READER 186, 189 (S. Randall Humm et al. eds., 1994) (citing Vera Institute of Justice, Foster Home Child Protection 63-64 (Feb. 1981) (unpublished report)).

adults, the overpowering assumption in this country's response is that the relationships themselves are not worth salvaging. The tendency of many abused women to try to reconcile with their abusers is seen as a problem, not a strength. These women should be encouraged to assume more self-reliance even though their own judgments about whether or not to support the arrest and prosecution of the abuser should not determine the law enforcement response.

While some women in abusive relationships clearly ask for help in stopping the violence but do not want to end the relationships, some advocates have urged forms of reconciliation while always putting safety first. The goal is not false forgiveness, which damages and even humiliates the individual and the society, but the creation of right relationships.²³ Something analogous is at work in the international efforts of non-governmental organizations to promote peaceful coexistence and prevention of intergroup violence by helping young people from historically conflicting societies exchange perspectives about the past and commit to a different kind of future.²⁴

At least these four features emerge when we compare responses to domestic violence and intergroup violence: (1) we respond in light of what we think are realistic options; (2) safety from violence at times may seem achievable only by separating those at risk from those who are violent; (3) the value of preserving or renewing relationships may be taken more seriously for children than between adults and more for abstract groups rather than neighboring individuals; and (4) there really are no adequate, much less wonderful legal solutions to violence.

On the last point, it is important to underscore how the use of criminal law enforcement is especially difficult to pursue in each of these contexts, however much it is touted by some as the best means to ensure safety and accountability. Reformers developed civil actions for adults in intimate relations because most people in those relationships find it difficult to turn to the criminal justice system to respond to assaults and other forms of violence. For a long time, police and prosecutors would not take the complaints seriously. In addition, many family members remain disinclined to pursue the criminal system.²⁵ The civil protection order seems like a good middle ground; a complainant can go to a judge, usually in the absence of the opposing party, to get a temporary restraining order. Therefore, she need not be intimidated by the abuser, nor need she choose between some form of

²³ See generally JEANNE SAFER, *FORGIVING & NOT FORGIVING: A NEW APPROACH TO RESOLVING INTIMATE BETRAYAL* (1999) (arguing that fostering healthy and continued relationships might better address the problems of intimate domestic violence).

²⁴ See *THE HANDBOOK OF INTERETHNIC COEXISTENCE* (Eugene Weiner ed., 1998).

²⁵ See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—the Legal Framework*, 31 *CONN. L. REV.* 77, 100 (1998).

legal response and keeping a partner out of jail, earning a living, and able to pay his share of the housing and child support.

A violation of the civil order could, of course, trigger jail time. Advocates hope that this threat is sufficient to secure compliance in many cases, or that jail time can be tailored to nights or weekends to permit the offender to earn a living. Or, in the eyes of one analyst, the criminal sanctions can be ordered more quickly for violating the civil protection order than in a full-scale criminal prosecution for assault.²⁶ Yet others note how defenseless the woman alone with her civil protection order remains when the offender shows up with a gun or a knife. Indeed, recent studies indicate that the very steps she takes toward separating from a violent partner can escalate the violence by jeopardizing his sense of control, and it is precisely when she initiates some kind of external involvement that she needs to be able to fall upon the full-scale powers of the criminal law enforcement system.²⁷

Developing a better understanding of the sources and dynamics of violence is crucial to generating effective responses from the legal system.

II. CONNECTING INTRAFAMILY AND INTERGROUP VIOLENCE

One way to deepen our understanding of both intimate and intergroup violence is to confront the connections between them. Doing so invites several competing theories: one draws on psychoanalysis and related theories, a second considers violence through the lens of gender, and a third examines societal approval of violence. I will sketch each, again with the hopes of identifying avenues of effective response and prevention.

A. Interconnections Between Intergroup and Intimate Violence

Societies with chronic conditions of war and intergroup conflict also witness increases in family violence. This phenomenon might reflect how people bring societal stress into the home, tempers flare, and people displace onto those in their intimate sphere frustration with loss of control elsewhere. Or it could reflect a more basic contagion theory of violence; people surrounded by violence pick it up and pass it on. Data linking intimate violence against women to high rates

²⁶ See David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1214 (1995) (arguing that criminal contempt is a good enforcement tool but not a panacea; contempt enforcement permits faster procedure than criminal prosecution for securing jail time, and it is a procedure that empowers women).

²⁷ See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1992) (noting that a woman is most in danger when she is first in contact with authorities).

of neighborhood violence in this country could support both theories.²⁸

Also striking is the prominence of individuals who have themselves been abused as children in the ranks of perpetrators of grotesque violence. An intensive study currently underway of Eugene De Kock, one of the most terrifying figures in Apartheid-South African violence, reveals that he himself was abused as a child.²⁹ The man who confessed to beating Matthew Shepard to death experienced sexual abuse as a child; his lawyer outlined a defense explaining that his terrorizing and murder were "driven by a drug-fueled rage born of childhood nightmares of sexual abuse and by the openly gay college student's pass at him."³⁰ Charles Manson, who masterminded eight grotesque murders, was himself as a child bounced between foster homes and correctional facilities where he was routinely beaten.³¹ Psychiatrist James Gilligan, who for years headed Bridgewater State Hospital for the criminally insane, observed that in the course of his work with the most violent men in maximum security settings, "not a day goes by that I do not hear reports—often confirmed by independent sources—of how these men were victimized during childhood . . . on a scale so extreme, so bizarre, and so frequent that one cannot fail to see that the men who occupy the extreme end of the continuum of violent behavior in adulthood occupied an equally extreme end of the continuum of violent child abuse earlier in life."³² Apparently Adolf Hitler was terrorized as a child by an alcoholic stepfather.³³

Even to note such links is to risk suggesting what my colleague Alan Dershowitz derisively dubs the "abuse excuse." I certainly resist this idea; moral and legal responsibility is not dissolved simply by facts about a perpetrator's own past suffering. Most child abuse survivors do not go on to murder others, nor do most child abuse survivors go on to abuse their own children. Thus, something far more complex is underway than simple learned and repetitive behavior. Yet trying to understand the roots of violence is a critical step toward preventing it.

²⁸ See Jeane Ann Grisso, *Violent Injuries Among Women in an Urban Area*, 341 NEW ENG. J. MED. 1899 (Dec. 16, 1999).

²⁹ The recruitment of disturbed individuals by oppressive governments to do their dirty work may be widespread. Slobodan Milosevic apparently recruited criminals and murderers to administer his policy of ethnic cleansing. See Chris Hedges, *Fatal Fight Over Spoils by Insiders in Belgrade*, N.Y. TIMES, Nov. 9, 1997, at A14; Charles M. Sennott, *Deadly Paramilitary Units Carry Out Will of Milosevic*, BOSTON GLOBE, Mar. 30, 1999, at A1.

³⁰ Patrick O'Driscoll, *Lawyer: Panic Drove Defendant, Groups Decry Defense in Shepard Case*, USA TODAY, Oct. 26, 1999, at A6.

³¹ See Kenneth Wooden, *WEEPING IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN 47-57* (1976) (detailing Charles Manson's case history).

³² JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 45 (1996).

³³ See Robert Coles, *The Death of a Child*, N.Y. TIMES, Apr. 8, 1990, § 7 at 1 (reviewing JOYCE JOHNSON, *WHAT LISA KNEW* (1990)).

B. Psychological Theories

Finding out that a perpetrator of violence was himself victimized as a child can at first seem perplexing; how could anyone who experienced abuse and its horrors go on to commit it? Psychoanalytic theorists offer several explanations. The child may come to identify with the aggressor in an effort to regain mastery, to overcome the shame of being a victim, and even in the mistaken view that aggression can reclaim the love or connection breached in the childhood experience. The very mistaken association between aggression and what was lost may lead to compulsive, repetitive violence because the hope of mastery and connection is of course never secured through momentary acts of violence.

The childhood abuse may have engendered such a sense of humiliation that further experiences with humiliation produce either rage or a sense of deadness that seems to be overcome only by committing acts of violence that at least give a brief sense of being alive.³⁴ The survivor of child abuse may so lose a capacity to feel and relate to the world that it becomes easy to dehumanize others.³⁵ Feeling rage means feeling alive in one's body. Often, such people feel dehumanized themselves; they may describe themselves as acting like machines or disembodied, disconnected from the world or the embodied self. Or a sense of fear about an engulfing or exploding world may lead to a need for control, expressed by engulfing or exploding.³⁶ Adults who were sexually or physically abused as children often have the profound experience of forced silence about and disconnection from intense feelings and pain, and then become unable to represent the truth in any other relationship.³⁷ None of these notions adequately explains why many that survive childhood abuse never go on to commit violence against others.³⁸ Do they process the experiences differently, have feelings of inhibition rather than aggression? Or do they find capacities to feel and to analyze that assist them in control-

³⁴ See GILLIGAN, *supra* note 32, at 45-88.

³⁵ See *id.* at 52. Gilligan suggests that the violators lack the ability to perceive their victims as human beings with feelings, "[b]ut how can one know that others have feelings, or be moved by the feelings of others, if one does not experience feelings oneself?" *Id.* at 52. I am grateful to Pumla Gobodo-Madikizela for her comments. See Pumla Gobodo-Madikizela, Comments at the John F. Kennedy School of Government Panel Discussion of The South African Truth and Reconciliation Commission (Oct. 18, 1999).

³⁶ See R.D. LAING, *THE DIVIDED SELF* 83 (1969). Gilligan argues that murderers kill because they see no choice: it is either he or me; the triviality of a precipitating event can actually trigger heightened sense of shame and on some level awareness of an incapacity to use nonviolent means to ward off the feelings of low self-esteem. Such people lack emotional capacities that normally inhibit violent impulses stimulated by shame. See GILLIGAN, *supra* note 32, at 11.

³⁷ See JEAN BAKER MILLER & IRENE PIERCE STIVER, *THE HEALING CONNECTION: HOW WOMEN FORM RELATIONSHIPS IN THERAPY AND IN LIFE* 82 (1997).

³⁸ Some of these victims, though, may be violent against themselves in various ways.

ling aggression? The psychoanalytic framework needs development but it does assist in mapping the logic of violence from the perpetrator's perspective.

C. *The Gender Lens*

A gender lens similarly offers explanations for violence that seem compelling but fall short of explaining why many—if not most—men do *not* assault their partners. The gender analysis also has not helped to explain sufficiently why women often use physical abuse with their children.³⁹ But the gender analysis resonates for many people and supports the political movement to name and respond to intimate violence. The gender analysis locates domestic violence as a feature of a patriarchal society. Such a society makes control and ownership the aspirations for men, including control and ownership of women and children. Young boys learn to identify with the power of men in such a society over women and children and to expect the gratification that comes from such power. Girls learn by watching adults that a woman is to be subservient, caring, attentive, and nurturing.⁴⁰ In a world that assigns radically different roles by gender, and monitors them through internalized notions of honor and shame, adult men are allowed to humiliate women.⁴¹ This analysis has assisted students of male violence in African-American communities to identify the special burdens for men who are denied the attributes and honor of maleness everywhere but in the home; violence against wives and lovers offers one small avenue for male prerogatives that women may themselves even understand as part of the cost of societal racism that so easily produces frustration, helplessness, and hopelessness.

A recent book entitled *The Dark Side of Man*⁴² draws on scholarship about primates, the biology of the human organism, and study of the brain to conclude that all men are physiologically prepared for aggression. Even their use of rape in wars, argues author Michael Ghiglieri, can be traced to biological imperatives.⁴³ Oddly, though, this author prescribes education of children in self-discipline, fairness, and cooperation,⁴⁴ despite the portrait of biological necessity he

³⁹ See BELL HOOKS, *TALKING BACK: THINKING FEMINIST/THINKING BLACK* 84-91 (1989) (applying a feminist perspective to violence in intimate relationships).

⁴⁰ See *id.* at 162 (describing the difficulty in breaking free of this training).

⁴¹ See GILLIGAN, *supra* note 32, at 265. Though the theory becomes complicated when a young man kills his father, a young man may need to avenge the honor of his mother and in this way work out a form of patriarchal logic. See *id.* at 263-65.

⁴² MICHAEL P. GHIGLIERI, *THE DARK SIDE OF MAN: TRACING THE ORIGINS OF MALE VIOLENCE* (1999).

⁴³ See *id.* at 92 (claiming that rape during times of war is based upon the soldier's sex drive and urge to procreate).

⁴⁴ See *id.* at 256 (explaining strategies to reduce violence).

paints. Perhaps biology plus socialization causes violence. It is striking that in most of human history, *men* have waged most wars against other men. The recent use of rape as a systematic strategy in Bosnia-Herzegovina seems a deliberate effort to demoralize the Muslim men.⁴⁵ Perhaps the most arresting fact about changes in warfare over this century is the shifting ratio of civilian to military casualties. At the start of the century, eighty-five to ninety percent of wartime casualties were military; by the 1990s, eighty percent of the casualties were civilians—and disproportionately, women and children.⁴⁶ Whether this should be understood as yet another elaborate play of patriarchal societies against one another or some new sort of gender equality, it is a terrifying fact.

D. The Theory that Society Approves Violence

The societal approval approach to violence starts with the prevalence of violence (some would claim its increasing presence). "People hit family members because they can," argue Richard Gelles and Murray Straus.⁴⁷ The knowledge—conscious or unconscious—that bosses, neighbors, police and prosecutors would trigger procedures and punishments constrains people from striking fellow workers and strangers. But hitting in the home triggers either little response or advice that the family members should "kiss and make up."⁴⁸ Society makes it clear that the costs of using violence in the home are low; social controls like police intervention are ineffective; the household is typically secluded from view; many adults think there are circumstances when a man can hit his wife; and most adults think that young people need "strong" discipline.

Societal approaches at times emphasize the pervasiveness of violence in mass media and mass culture. The government's own uses of violence—in response to crime, disorder, homeless people, and international affairs—also contributes to the pervasive message that violence is acceptable, necessary, and even admirable.⁴⁹ In the midst of a recent training video on responses to intimate violence, Linda Mills comments on how the U.S. action in Iraq—killing thousands of civilians—mirrors the place of violence as a suppressed yet ever-

⁴⁵ See MARY KALDOR, *NEW & OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* 56 (1999) (describing rape as a type of psychological warfare practiced in the recent conflicts in Bosnia-Herzegovina).

⁴⁶ See *id.* at 100.

⁴⁷ RICHARD J. GELLES & MURRAY A. STRAUSS, *INTIMATE VIOLENCE* 20 (1988).

⁴⁸ *Id.* at 22.

⁴⁹ I have made similar assertions in the past. See, e.g., Minow, *supra* note 21 at 1672 ("Law itself is violent in its forms and methods. Official power effectuates itself in physical force, threatened or carried out.").

present dimension of daily American life.⁵⁰ Similarly, two therapists describe how perpetrators of intimate violence enact a “colonizer’s view” of power realized through stratification and control rather than mutually enhancing relationships.⁵¹ Perhaps there is something of the societal view in Solzhenitsyn’s comment: “Violence does not and cannot exist by itself; it is invariably intertwined with the lie,” and in Rap Brown’s assertion, “violence is as American as cherry pie.”⁵²

III. BREAKING OUT OF VIOLENT CYCLES

Although I have been critical of the limitations of the psychoanalytic, gender, and societal views of violence, they each afford useful insights. They also adopt contrasting methods and offer distinctive explanations. They support alternative responses to violence. But we need not assume that they require inconsistent responses to violence or that only one is correct or persuasive. Taken together, they suggest that triggers from the social environment, including patterns of gender inequality and male dominance, incite violence in individuals who have been sensitized to shame.⁵³ In one more particular respect, the three theories are remarkably consonant.

Psychoanalytic, gender, and societal theories each emphasize how violent behavior elicits violent responses. State-ordered punishment repeats shame and aggression that themselves animate the violent offender, suggest psychoanalytic theorists.⁵⁴ Male-styles of power over others in the image of the patriarchal state replicate and underscore the gender patterns condemned by the gender lens. Societal approval of violence—itsself teaching the acceptability of violence—is perhaps nowhere more graphic than when the state itself embraces violence, as in the death penalty and as in training police to assault, shoot, and even brutalize suspects.

Each of these approaches therefore implies that the best societal response must somehow break out of the cycle of violence rather than repeat and perpetuate it. For law, this of course poses a serious dilemma. The state’s use of force, constrained and directed by law, is no less force; the state’s monopoly on lawful violence is no less vio-

⁵⁰ THE SPACE IN BETWEEN: A PORTRAIT OF INTIMATE ABUSE (U.S. Dept. of Health and Human Serv., 1997).

⁵¹ See MILLER & STIVER, *supra* note 37, at 58.

⁵² BARTLETT’S FAMILIAR QUOTATIONS 772 (16TH ED.) (1992).

⁵³ See GILLIGAN, *supra* note 32, at 223.

⁵⁴ John Braithwaite has advanced a conception of “reintegrative shaming,” a method of punishing while embracing the wrongdoer as still a vital and valued member of the community. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989). This work has helped to inspire instructive experiments in restorative justice. Yet these efforts, and the “reintegrative shaming” notion, require the presence of a sufficiently coherent and engaged community to have the capacity to reintegrate a wrongdoer. In many circumstances of contemporary violence, this is precisely what is lacking.

lent for being lawful. If law responds to violence with punishment for offenders, is it then not enacting, modeling, and perpetuating violence?

The question raises quite practical dimensions for those who administer the law. A few years ago, I led a discussion for a group of judges of a short story by Alice Munro entitled "Royal Beatings."⁵⁵ The story reveals a repeated family dynamic. The stepdaughter triggers the anger of the stepmother and both of them know the cycle that will follow: the stepmother calls the father to discipline his daughter. After giving her a look filled "with hatred and pleasure,"⁵⁶ he lashes her with his belt and then his hands, and the beating continues long after she shrieks and cries. Yet the daughter knows she is playing a victim role and watches the subsequent acts unfold with the confidence of the scriptwriter. Later the stepmother comes, as always, to comfort her with a tray of food to eat in bed.⁵⁷ As the judges and I discussed this repeated pattern and acknowledged that all three participants apparently knew, each time, what had happened and what would happen, one judge commented, "[y]ou know, when a family like this comes to court, I never know whether the court is breaking the pattern or simply becoming another participant in it."

Dr. Martin Luther King, Jr. brilliantly argued and demonstrated that, "nonviolence is the answer to the crucial political and moral questions of [his] time—the need for man to overcome oppression and violence without resorting to violence and oppression."⁵⁸ How can this kind of insight, this moral jujitsu, guide the state itself?

I do not have a full answer to this question. But I have an intriguing example. In 1990, the superintendent of police in New Haven, Connecticut decided that a radical change in approach was needed to deal with violence in the community. With the support of other city leaders, the police department declared that it would abandon the military model and instead embrace a form of community policing committed to maintaining order "legally, humanely, respect-

⁵⁵ Alice Munro, *Royal Beatings*, in *THE NORTON ANTHOLOGY OF SHORT FICTION* 473 (R.V. Cassill ed., 2d ed. 1981). This was part of the "Doing Justice" program at Brandeis University. Launched by Saul Touster, the program conducted sessions with judges and other professionals and used fiction to explore general themes of professional accountability, moral choice, and public and private roles.

⁵⁶ *Id.* at 486.

⁵⁷ See *id.* at 488-89.

⁵⁸ Martin Luther King, Jr., Nobel Prize Acceptance Speech (Dec. 10, 1964), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 224, 224 (James Melvin Washington ed. 1986).

fully and equitably.”⁵⁹ It adopted a new slogan: “Police others as you would police you.”⁶⁰

Then the department really showed it meant action. It moved out all the teachers from its police academy and hired a woman named K.D. Codish to direct the academy and all training for the department. As she states her message:

It was no longer enough to be big, strong, male and tough. Instead, reading, writing, talking, listening, solving problems, caring about people, being part of the community, being ‘nice’ and acting respectfully to felons as well as to elected officials were now what the job was to entail, and therefore, what should be taught at the academy. Soon it would be more important to know the telephone number of the local drug treatment clinic than the statute number of the drug violation.⁶¹

Still crucially recognizing and implementing boundaries to ensure people’s safety, the police should also be sources of help to those at risk of behaving with violence towards others or themselves.

Codish shifted the academy to a university model with opening sessions on anti-discrimination policies, nonviolence and alternative dispute resolution, community mediation, children’s responses to parental arrests, violence against women, mental illness and homelessness. The academy now requires all attendees to participate in classes held at community sites, such as homeless shelters, where the officers-in-training share meals with people from and about whom they are to learn.

A crucial element of the training program directs the students to conduct field and library research and then work in collaboration with artists to develop artistic presentations of their findings in forms that can be shared with the public. A sculpture installation on families struggling with mental illness, a visual art exhibit on child abuse, and a video exploring a day in the life of a homeless person are recent examples.⁶²

Given the recasting of the training and roles for police, the department has also shifted its recruitment strategies and hiring criteria. Codish explains that maturity, life experience, communication skills,

⁵⁹ New Haven Police Academy, Preventing Broken Windows 2 (1999-2000) (on file with the *Case Western Reserve Law Review*). Thanks to Susan Sturm and Elaine Chiu for teaching me about this.

⁶⁰ *Id.* at 7.

⁶¹ New Haven Police Academy, Putting One Sacred Cow Out to Pasture 1 (1998) (on file with the *Case Western Reserve Law Review*).

⁶² See New Haven Police Academy, Different Drummers: People with Mental Illness, Term Projects (1998) (on file with the *Case Western Reserve Law Review*).

and abilities to deal with stress are better predictors of good performance than physical stature, strength, or a love of adventure.⁶³

Community policing is working well in New Haven and other cities are using New Haven as a model.⁶⁴ Certainly, arrests and criminal prosecutions with convictions and jail time still are part of the law enforcement practice. More needs to be learned about what really goes on there, and elsewhere, in the name of community policing. But this kind of creative reconstruction suggests directions for uses of state power that do not model the violence it is intended to prevent.

This essay attempts to initiate inquiry into whether legal and communal responses to violence can and should depart from violence—and if so, how? In the current situation in Kosovo, for example, simply getting a standard civil police system in place would be an enormous accomplishment. Currently, the few Serbs who remain require individualized guard protection to survive risks of vigilante revenge. In addition, the Albanian Kosovars run the hospitals and will not permit treatment for Serbs. Perhaps the international peace-keeping force could focus on making medical care available to anyone, regardless of ethnicity, and thereby model the combination of security and protection that breaks cycles of violence.⁶⁵ Yet it remains difficult even to find the authority, legitimacy, and political will to accomplish this goal.

As I close, I cannot resist two more Yogi Berra-isms. The first, I know, I am taking out of context. Perhaps his most famous comment about baseball is: "How can you think and hit at the same time?" This is often imported into academic circles to chide those of us who do a lot of thinking and not so much doing. But I think it is also a pretty nifty reminder of mindfulness as a potential guard against the brutal kind of hitting.

And then, there is perhaps Yogi's apt comment, reserved for just this kind of moment, at the end of my essay here but not the end of our work in finding solutions to interfamily and intergroup violence: "It ain't over till it's over."

⁶³ See *id.* at 3.

⁶⁴ See Jack Cavanaugh, *Public Safety: Walking a Beat Returns to Stamford*, N.Y. TIMES, Dec. 21, 1997, § 14, at 1. The New Haven police also work closely with the Yale Child Study Center to understand the roots of violence. See Andrew Julien, *Students, Dodd Speak Piece on Violence*, HARTFORD COURANT, May 11, 1993, at B13.

⁶⁵ Thanks to Michael Ignatieff, James Herzog and Mark O'Connell for discussions related to this point.